Exquisite Merge (M) Sdn Bhd v Life Publishers Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-02-314 OF 1994
SHAIK DAUD, NH CHAN AND MAHADEV SHANKAR JJCA
26 MARCH AND 16 AUGUST 1996

Agency *— Foreign principal — Personal liability of agent — Application of s 183 of the Contracts Act 1950 — Disclosed principal — Presumption of personal liability of agent under s 183 — Whether presumption imposed by s 183(a) rebutted — Whether agent personally liable under the contract — Contracts Act 1950 s 183(a)*

Agency *— Liability of agent — Whether personally liable — Application of s 183 of the Contracts Act 1950 — Disclosed foreign principal — Presumption of personal liability of agent under s 183 — Whether presumption imposed by s 183(a) rebutted — Whether agent personally liable under the contract — Contracts Act 1950 s 183(a)*

The respondent entered into a contract with the appellant where the latter agreed to supply newsprint printing paper to the respondent. In the contract, the respondent was described as the buyer and consignee and the seller was Ekman International Incorporation of New York, USA. The respondent claimed that the supply was defective as it was not to the specification agreed upon. The appellant argued that it was not personally liable as it was at all material time contracting as an agent for a disclosed principal. The appellant further emphasized on the word 'through' in the contract itself to show that it was merely acting as an agent. On the other hand, it was the contention of the respondent that the facts did not show that the appellant contracted as an agent but even if it did so contract, the appellant was not absolved from personal liability and would and could be held liable under the provisions of s 183(a) of the Contracts Act 1950 ('the Act').

The learned judge held the appellant to be liable and entered judgment in favour of the respondent. The appellant appealed. The sole issue was whether the appellant was personally liable under the contract.

Held, dismissing the appeal:

(1) (Per **Shaik Daud JCA**) According to s 183(a) of the Act, an agent is personally liable as a matter of statutory presumption. This presumption arises when it is proved that the agent is acting on behalf of his principal in respect of a contract for the sale and purchase of goods from a principal who is abroad. However, an agent could extricate itself from personal liability, either by express words or impliedly showing that the agent had in fact contracted out of such a statutory presumption or such personal liability.

The appellant in the present appeal must be held personally liable for the contract which it admittedly entered with the respondent on behalf of the principal who was resident abroad. The expression 'through' in the contract could not, by any

stretch of imagination, extricate the appellant from personal liability. There must be some express words or phrase in the contract to enable the appellant to escape liability, or impliedly, by necessary inference or by implication from some documentary evidence or surrounding circumstances showing that the agent had in fact contracted out of personal liability or statutory presumption. No such express words or any such evidence was shown to exist to enable the court to infer such extrication. Section 183(a) of the Act applied to the appellant and the appellant was personally bound by or could be sued personally on the contract (see pp 753I and 754A–B, D–E); *Medicon Plastic Industries Sdn Bhd v Sykt Cosa Sdn Bhd* [1993] 2 MLJ 416 followed.

(2) (Per **Mahadev Shankar JCA**) Each of the presumptions in s 183(a), (b) and (c) stands by itself. Where a contract is being concluded by two parties, both within Malaysia, the rule is that if one of them is known by the other to be contracting as an agent, then he cannot sue or be sued on the contract. If in such circumstances, the agent is to be invested with capacity to sue and/or with personal liability for default, there has to be a contract to that effect which has to be proved. In each of these situations, an agent who contends that he is not liable must produce evidence to rebut the presumption. The issue in this case was not whether s 183(a) applied; obviously, it did. It was whether the presumptive liability imposed upon the appellant had been rebutted. From the facts, it was clear that there was no evidence to rebut the presumption (see p 755C, E–F).

[Bahasa Malaysia summary

Penentang mengikat suatu kontrak dengan perayu ('kontrak tersebut') di mana perayu bersetuju untuk membekalkan kertas cetakan akhbar kepada penentang. Dalam kontrak tersebut, penentang digambarkan sebagai pembeli dan penerima konsain dan penjual adalah Ekman International Incorporation, New York, Amerika Syarikat. Penentang mendakwa bahawa bekalan adalah cacat kerana ia tidak mengikut apa yang dipersetujui. Perayu menghujahkan bahawa ia sendiri tidak bertanggungjawab kerana ia mengikat kontrak sebagai ejen untuk prinsipal yang dizahirkan pada semua masa material. Perayu seterusnya menitikberatkan perkataan 'melalui' dalam kontrak tersebut bagi menunjukkan bahawa ia cuma bertindak sebagai ejen. Sebaliknya, ia dihujahkan oleh penentang bahawa fakta-fakta tidak menunjukkan bahawa perayu mengikat kontrak sebagai ejen tetapi jika pun ia telah berbuat demikian, perayu tidak dibebaskan daripada liabiliti diri dan akan dan boleh didapati bertanggungjawab di bawah peruntukan s 183(a) Akta Kontrak 1950 ('Akta tersebut').

Hakim yang arif mendapati perayu bertanggungjawab dan memasukkan penghakiman memihak kepada penentang. Perayu membuat rayuan. Satu-satunya isu adalah sama ada perayu sendiri bertanggungjawab di bawah kontrak tersebut.

Diputuskan, menolak rayuan:

(1) (Oleh **Shaik Daud HMR**) Menurut s 183(a) Akta tersebut, seseorang ejen sendiri bertanggungjawab sebagai satu perkara anggapan statutori. Anggapan ini timbul apabila ia dibuktikan bahawa ejen bertindak bagi pihak prinsipalnya berhubung dengan satu kontrak jual beli barangan daripada seorang prinsipal yang berada di luar negeri. Namun demikian, seseorang ejen boleh melepaskan diri daripada liabiliti diri, sama ada dengan perkataan-perkataan nyata atau secara tersirat dengan menunjukkan bahawa ejen pada hakikatnya telah mengikat kontrak luar daripada anggapan statutori atau liabiliti diri sedemikian.

Perayu sendiri dalam rayuan ini mestilah didapati bertanggungjawab atas kontrak tersebut yang diakuinya diikat dengan penentang bagi pihak prinsipal yang bermastautin di luar negeri. Ungkapan 'melalui' dalam kontrak tersebut tidak boleh melepaskan perayu daripada liabiliti diri. Mesti ada perkataan-perkataan nyata atau ungkapan dalam kontrak tersebut bagi membolehkan perayu melepaskan liabiliti, atau secara tersirat, melalui inferens wajib atau melalui implikasi daripada keterangan dokumentar atau keadaan sekeliling yang menunjukkan bahawa ejen memang telah mengikat kontrak luar daripada liabiliti diri, atau anggapan statutori. Tiada perkataan-perkataan nyata atau keterangan sedemikian ditunjukkan telah wujud bagi membolehkan mahkamah membuat inferens pelepasan sebegitu. Seksyen 183(a) Akta tersebut terpakai kepada perayu dan perayu sendiri terikat dengan kontrak atau dengan sendirinya boleh didakwa atas kontrak tersebut (lihat ms 753I dan 754A–B, D–E); *Medicon Plastic Industries Sdn Bhd v Sykt Cosa Sdn Bhd* [1993] 2 MLJ 416 diikut.

(2) (Oleh **Mahadev Shankar HMR**) Setiap satu anggapan dalam s 183(a), (b) dan (c) berdiri dengan sendiri. Di mana suatu kontrak diikat oleh dua pihak, kedua-duanya di Malaysia, rukun adalah bahawa jika satu daripada mereka diketahui oleh yang satu lagi mengikat kontrak sebagai ejen, maka dia tidak boleh mendakwa atau didakwa atas kontrak itu. Jika dalam keadaan demikian, ejen diletak dengan keupayaan untuk mendakwa dan/atau dengan liabiliti diri jika ingkar, mesti terdapat kontrak yang harus dibuktikan. Dalam setiap keadaan ini, ejen yang menghujahkan bahawa dia tidak bertanggungjawab mesti mengemukakan bukti untuk mematahkan anggapan. Isu dalam kes ini bukanlah sama ada s 183(a) terpakai; dengan nyata, ia memang terpakai. Ia adalah sama ada liabiliti diri yang dikenakan atas perayu telah dipatahkan. Dari fakta, adalah jelas bahawa tiada keterangan bagi mematahkan anggapan (lihat ms 755C, E–F).]

Notes

For cases on foreign principal, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 578–581.

For cases on liability of an agent, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 596–627.

Cases referred to

Khemanico Textiles v Gian Singh & Co Ltd [1963] MLJ 360 (refd)
Medicon Plastic Industries Sdn Bhd v Sykt Cosa Sdn Bhd [1993] 2 MLJ 416 (folld)
Nandan Iron & Metal Industries v Forestry Inc AIR 1992 Delhi 364 (refd)

Legislation referred to

Contracts Act 1950 s 183(a), (b), (c)

Appeal from: Civil Suit No D5–22–55–1994 (High Court, Kuala Lumpur)

Amritpal Singh (*Khatijah Rauf & Co*) for the appellant.
DP Naban (*KA Gan* with him) (*Lee Hishamuddin*) for the respondent.

26 March 1996

Shaik Daud JCA: This appeal is from the decision of the learned judge who had granted final judgment to the respondent for a sum of RM211,358.01 together with interest at 10.25% per annum from 23 November 1993 to the date of full realization and costs. It is common ground that the respondent's claim arose from a contract where the appellant had agreed to supply newsprint printing paper to the respondent but the supply was defective as it was not to the specification agreed upon. As a result the respondent claimed they had suffered damage to the tune of RM211,358.01 as particularized in para 8 of their statement of claim. It is also common ground that the sole issue to be decided is whether the appellant is liable. The appellant claimed that they were at all material time contracting as an agent for a disclosed principal and therefore they are not personally liable. It is the contention of the respondent that the relevant fact does not show the appellant contracted as an agent but even if they did so contract, they are not absolved from personal liability and would and could be held liable under the provisions of s 183(a) of the Contracts Act 1950 ('the Act').

The learned judge of the High Court, relying on the decision of the (then) Supreme Court in *Medicon Plastic Industries Sdn Bhd v Syarikat Cosa Sdn Bhd* [1993] 2 MLJ 416, held the appellant to be liable and entered judgment in favour of the respondent.

It is common ground that the appellant entered into the contract with the respondent on 17 June 1993 for the supply of 150 metric tonnes of Abitibi newsprint printing paper. However, the supply delivered to the respondent was of a different quality altogether and, by a faximile transmission of 16 November 1993, the appellants had admitted to the slip-up in the delivery. In the contract, the respondent has been described as the buyer and consignee and the seller was Ekman International Incorporation of New York, USA.

The appellant's only issue is that they were at all material times acting as an agent for a disclosed principal and therefore not personally

liable. They had emphasized on the word 'through' in the contract itself to show that they were merely acting as an agent. It is contended by the appellant that following the principle in *Medicon*'s case, they in fact had expressly contracted out of the contract. For this, the appellant relied heavily on the expression 'through' in the contract. It is contended that the appellant did not sign the contract as the seller and the expression 'through' in the contract clearly indicated that they had expressly contracted out personal liability for the contract. At most, it is contended that appellant is merely an indenting agent. In support, the case of *Khemanico Textiles v Gian Singh & Co Ltd* [1963] MLJ 360 was cited, where it was held that the plaintiffs therein acted as indenting agents were only acting on behalf of the foreign principals and had no power to contract. It must be borne in mind that, in the present case, it is not disputed that the appellant did enter into contract with the respondent albeit on behalf of the foreign principal. A fortiori where appellant admitted the foul up in the delivery.

As this appeal revolves around s 183 of the Contracts Act 1950, it is pertinent to set out and consider the provisions of that section:

Section 183 provides:

> In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.
>
> Such a contract shall be presumed to exist in the following cases:
>
> (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
>
> (b) where the agent does not disclose the name of his principal; and
>
> (c) where the principal, though disclosed, cannot be sued.

Clearly, the present case falls under s 183(a) of the Act. As the learned judge followed the decision in *Medicon*'s case, it is also pertinent to see whether the facts of that case is similar. In that case, both the plaintiff and the defendants are locally incorporated companies. The plaintiff had purchased certain machines from the defendant for the purpose of making plastic bottles, and when the machines arrived from Switzerland, the plaintiff had complained that they were not fit for the purpose for which they were purchased, they were defective and not of merchantable quality. The defendant in their defence contended that there was no contract between them and the plaintiff and if a contract existed, it was between the plaintiff and the defendant's principal, a foreign company called 'UHAG Kebersee-Handel Ag Zurish' ('UHAG'). The High Court held that there was no contract in law between the plaintiff and defendant and that the defendant had merely arranged a contract which was entered into between plaintiff and UHAG and that the defendant was merely an agent. On appeal by the plaintiff, the Supreme Court disagreed and in allowing the appeal held that s 183(a) of the Act unmistakenly applied and that the agent is personally liable as a matter of statutory presumption. This presumption arises when it is proved that the agent is acting on behalf of his principal in respect of a contract for the sale and purchase of goods from a principal who is abroad.

It cannot be gainsaid that the facts of the present appeal are similar to the facts in *Medicon*'s case. Therefore, applying the principle in *Medicon*'s case, the appellant in the present appeal must be held personally liable for the contract which they admittedly entered with the respondent on behalf of the principal who is resident abroad. The Supreme Court in *Medicon* also considered the circumstances when such an agent can extricate itself from personal liability, where it held that the only way is either by express words or impliedly showing that the agent had in fact contracted out of such a statutory presumption or such personal liability. The Supreme Court found no such evidence in *Medicon*'s case.

In the present appeal, it is contended that the expression 'through' in the contract had expressly extricated the agent, ie the appellant from personal liability. The learned judge did not find favour with this contention when he held that that expression merely emphasized the fact that they were actually only the agent. I agree with this finding. I am of the considered view that the expression 'through' in the contract cannot, by any stretch of imagination, extricate the appellant from personal liability. There must be some express words or phrase in the contract to enable the appellant to escape liability, or impliedly, by necessary inference or by implication from some documentary evidence or surrounding circumstances showing that the agent had in fact contracted out of personal liability, or statutory presumption. I have not been shown such express words or any evidence to enable me to infer such extrication. Section 183(a) of the Act applied to the appellant and they are personally bound by or could be sued personally on the said contract. In the light of this, I find myself in complete agreement with the learned trial judge, I therefore dismiss the appeal with costs.

16 August 1996

NH Chan JCA: I agree that the appeal be dismissed with costs.

Mahadev Shankar JCA: To the judgment of my brother Shaik Daud JCA, I wish to add a few words of my own so as to ensure if possible, that the misconception of the appellant's counsel is not repeated.

It was based on a misunderstanding of s 183 of our Contracts Act 1950. This may have had its genesis in the slightly different wording of s 230 of the Indian Contracts Act. The text of that section is reproduced in *Nandan Iron & Metal Industries v Forestry Inc* AIR 1992 Delhi 364 at p 365. *If* the text has been accurately reproduced there, it is to be observed that the conjunction 'and' which occurs after the semi-colon in our s 183(b) is missing. [I say 'If' because the accuracy of the text is suspect. See the wording of s 230(3) at p 366 of the report which wrongly uses the word 'discharge' when it ought to be 'disclosed'].

This omission of the word 'and' in the Indian section, and its inclusion in our s 183(b) appears to have conveyed the impression to the appellant's counsel that it will be presumed that an agent is personally liable for contracts entered into on behalf of a principal *only* where all three situations spelt out in s 183(a), (b) and (c) are cumulatively applicable. So it was submitted that because the contract documents showed that the appellant

had made the contract as agent for Ekman, a merchant in New York [183(a) satisfied], and had disclosed his name [s 183(b) not satisfied] and Ekman New York could be sued [183(c) not satisfied], it could not be presumed that the parties had contracted to impose the appellant with personal liability for the non-fulfillment of its terms.

The numerous authorities on the point, of which *Medicon*'s case is one, and a proper reading of s 183 shows that the construction placed by the appellant's counsel is wholly misconceived.

Each of the presumptions in s 183(a), (b) and (c) stands by itself. Where a contract is being concluded by two parties, both within Malaysia, the rule is that if one of them is known by the other to be contracting as an agent then he cannot sue or be sued on the contract. If in such circumstances, the agent is to be invested with capacity to sue, and/or with personal liability for default, there has to be a contract to that effect which has to be proved.

In each of the three situations in s 183, the law will presume that such a contract exists. It is to be noted that only s 183(a) refers to a position where the Malaysian agent is buying or selling goods for a party resident abroad. Section 183(b) and (c) could equally apply where all parties are in Malaysia at the time the contract is concluded.

In each of these situations, an agent who contends that he is not liable must produce evidence to rebut the presumption. The issue in this case was not whether s 183(a) applied; obviously, it did. It was whether the presumptive liability imposed upon the appellant had been rebutted.

The trial judge has admirably set out the salient facts and the law applicable. He held there was no evidence to rebut the presumption. This appeal was therefore devoid of merit and was dismissed with costs.

Appeal dismissed.

Reported by Loo Lai Mee